UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

SECURITAS SECURITY SERVICES USA, INC.

and Cases 31-CA-072179

31-CA-088081

CHARLES DUNAWAY, an Individual

and Cases 31-CA-072180

31-CA-088082

WALTER LINARES, an Individual

Rudy I. Fong-Sandoval, Esq., for the Acting General Counsel.
William J. Emanuel, Esq., and
Elizabeth D. Parry, Esq. (Littler
Mendelson, P.C.), of Los Angeles,
California, for the Respondent.
Dennis F. Moss, Esq., of Ventura California,
Ira Spiro, Esq., and Linh Hua, Esq.
(Spiro Moore, LLP), of Los Angeles, California, for the Charging Parties.

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge. This matter is based on a stipulated record. The initial charges in this matter were filed on January 9, 2012. Since the submission of this matter to me on June 18, 2013, briefs have been received on about August 22, 2013, from counsel for the General Counsel (General Counsel), counsel for the Respondent, and counsel

for the Charging Parties. Upon the stipulated record, and consideration of the briefs submitted, I make the following

Findings of Fact

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I. Jurisdiction

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At all material times, Securitas has been a corporation with an office and place of business in Westlake Village, California. During the year ending December 31, 2012, Securitas performed services valued in excess of \$50,000 in states other than California. At all material times, Securitas has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act.

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II. Alleged Unfair Labor Practices

A. Issues

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The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1) of the Act by maintaining two dispute resolution agreements; by attempting to enforce one of the agreements in state court litigation; and by including language in both agreements that employees reasonably could believe bar or restrict their right-to-file charges with the National Labor Relations Board.

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B. Facts

The parties entered into the following stipulation of facts:

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1. At all material times, Securitas has been a corporation with an office and place of business in Westlake Village, California. During the year ending December 31, 2012, Securitas performed services valued in excess of \$50,000 in states other than California. At all material times, Securitas has been an employer engaged in commerce within the meaning of the National Labor Relations Act.

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2. The Charging Parties in this proceeding, Charles Dunaway ("Dunaway") and Walter Linares ("Linares"), are former employees of Securitas. Dunaway was hired by Securitas on or about November 28, 2006, and his employment was terminated on or about October 15, 2008. Linares was hired by Securitas on or about July 12, 2001, and his employment was terminated on or about January 21, 2009.

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3. On June 26, 2009, Dunaway and Linares, together with one other individual, filed a class action in Los Angeles County Superior Court against Securitas on behalf of certain employees and former employees of Securitas in California. This action, which is still pending, is entitled Walter Linares, Charles Dunaway, and Sandra Blacksher, etc. v. Securitas Security Services USA, Inc., Case No. BC4 16555. Dunaway and Linares were former employees of Securitas when this action was filed.

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4. On or about June 14, 2011, Securitas implemented a form of agreement entitled Securitas USA Dispute Resolution Agreement, which Securitas refers to informally as the new hire agreement. This form has been distributed to employees hired by

Securitas in California after June 14, 2011. It does not include an opt-out provision and the affected employees have been required to sign it.

5. On or about June 14, 2011, Securitas also implemented a form of agreement entitled Securitas Security Services USA, Inc. Dispute Resolution Agreement, which Securitas refers to informally as the current employee agreement. This form was distributed to employees who were employed by Securitas in California on June 14, 2011. The form states that employees could opt out of the coverage of the agreement by calling a toll free telephone number within 30 days after receiving it. According to the records of Securitas, approximately 1393 employees in California opted out of the coverage of the agreement, and approximately 12,787 employees in California did not opt out.

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- 6. On January 9, 2012, Dunaway filed the unfair labor practice charge in Case 31–CA–072179 and Linares filed the charge in Case 31–CA–072180, both alleging a violation of Section 8(a)(1) of the Act. Securitas was served with copies of both these charges on about January 13, 2012. On March 23, 2012, these charges were amended to add an allegation that Section 8(a)(4) of the Act had been violated, but that allegation was withdrawn from the charges on about August 29, 2012. Securitas was served with copies of amended charges on about March 28, 2012. On August 24, 2012, Dunaway filed the charge in Case 31–CA–088081 and Linares filed the charge in 31–CA–088082, both served on Respondent on about August 28, 2012, both alleging a violation of Section 8(a)(1) of the Act. Dunaway and Linares were former employees of Securitas when all of these charges and amendments were filed with the Board.
- 7. On August 21, 2012, Securitas filed a motion with the Superior Court in the class action described above to amend the class definition to exclude the employees who are subject to arbitration under the current employee agreement.
 - ISSUE 1: Did Securitas violate Section 8(a)(1) of the Act by maintaining two Dispute Resolution Agreements since about June 1, 2011.
 - ISSUE 2: Did Securitas violate Section 8(a)(1) of the Act by, since about August 21, 2012, enforcing one of its Dispute Resolution Agreements when it asserted the agreement in state court litigation brought against Securitas by Charging Parties?
- Beginning on June 14, 2011, and continuing thereafter the new employee mandatory dispute resolution agreement entitled Securitas USA Dispute Resolution Agreement (new hire agreement) has been distributed to the Respondent's newly hired employees. They are required to sign it as a condition of employment. It is a 2 1/3 page, single spaced document. It begins as follows:

SECURITAS USA DISPUTE RESOLUTION AGREEMENT

1. This Agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. and evidences a transaction involving commerce. This Agreement applies to any dispute arising out of or related to Employee's employment with Securitas Security Services USA, Inc. or one of its affiliates, subsidiaries or parent companies ("Company) or

termination of employment. Nothing contained in this Agreement shall be construed to prevent or excuse Employee from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures. Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law, and therefore this Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Agreement, but not as to the enforceability, revocability or validity of the Agreement or any portion of the Agreement. The Agreement also applies, without limitation, to disputes regarding the employment relationship, any city, county, state or federal wage- hour law, trade secrets, unfair competition, compensation, breaks and rest periods, uniform maintenance, training, termination, or harassment and claims arising under the Uniform Trade Secrets Act. Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non- Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims (excluding workers compensation, state disability insurance and unemployment insurance claims). Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate.

Paragraph 4 of the agreement is as follows:

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4. In arbitration, the parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses, and any disputes in this regard shall be resolved by the Arbitrator. However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or representative action ("Class Action Waiver"). Notwithstanding any other clause contained in this Agreement, the preceding sentence shall not be severable from this Agreement in any case in which the dispute to be arbitrated is brought as a class, collective or representative action. Although an Employee will not be retaliated against, disciplined or threatened with discipline as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class, collective or representative action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act and seek dismissal of such class. collective or representative actions or claims. Notwithstanding any other clause contained in this Agreement, any claim that all or part of the Class Action Waiver is unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator.

The agreement concludes as follows:

8. This Agreement is the full and complete agreement relating to the formal resolution of employment- related disputes. In the event any portion of this Agreement is deemed unenforceable, the remainder of this Agreement will be enforceable. If the Class Action Waiver is deemed to be unenforceable, the Company and Employee agree that this Agreement is otherwise silent as to any party's ability to bring a class, collective or representative action in arbitration.

I HAVE READ AND I UNDERSTAND AND AGREE TO ALL OF THE TERMS CONTAINED IN THIS DISPUTE RESOLUTION AGREEMENT.

5	Employee Name: Signature: Date:
10 15	On about June 14, 2011, the Securitas Security Services USA, Inc. Dispute Resolution Agreement (current employee agreement) was distributed to all of the Respondent's then current employees (as noted, on and after that date only the new hire agreement has been distributed to the employees). The current employee agreement is a 3 1/2 page, single-spaced, document. The initial pages are identical to the new employee agreement, and the remainder of the agreement is as follows:
	7. This Agreement is intended broadly to apply to all controversies hereafter arising
20	out of or related to your employment relationship with the Company as well as an agreement to submit to arbitration any existing controversy arising from or related to your employment as is permitted under Section 2 of the Federal Arbitration Act. In some cases, claims have been made in court (non-arbitration) litigation on behalf of Company employees in which those employees desire to represent claims of other employees in class, collective or other representative actions (referred to as 'Actions"). If you are a
25	named party plaintiff, or have joined as a party plaintiff this Agreement shall not apply to those Actions, and you may continue to participate in them without regard to this Agreement. If you have retained counsel with respect to any claim that may be subject to this agreement you should consult that counsel. You may consult private counsel with respect to any aspect of this Agreement.
30	This Agreement, however, shall apply to all Actions in which you are not a plaintiff or part of a certified class. The Company is aware of the following Actions in-which class or representative claims have been alleged, which generally involve employee claims for unpaid wages:
35	California: Michael J. Holland, David Richardson and Geraldine Evans v. Securitas Security Services USA, Inc., filed 7/18/2008, Los Angeles Superior Court Case No. BC394708; Walter Linares, Charles Dunaway and Sandra Blacksher v. Securitas Security Services USA, Inc., 6/26/2009; Los Angeles Superior Court Case No. BC432135; Christine Brisco v. Securitas Security Services USA, Inc., filed 2/18/2010,
40	Los Angeles Superior Court Case No. BC4165555; Stephen Goodwin; William Wolff; Christopher Coffelt; Randall Der, Donna Forman v. Securitas Security Services USA, Inc., filed 9/25/2009, UISDC, Eastern District of California Case No. 2:09 CV-02685-KJM-DAD; Forrest Huff v. Securitas Security Services USA, Inc., filed 7/12/2010, Santa Clara Superior Court Case No. 1100-CV-1 72614; Marvin Melara v. Securitas Security
45	Services USA, Inc., filed 10/26/2010, Los Angeles Superior Court Case No. BC448078; Miguel Luna Candelas v. Securitas Security Services USA, Inc., filed 5/5/2011, Los Angeles Superior Court Case No. BC481J352.

Florida: Jean Loriston v. Securitas Security Services USA, Inc., filed 12/30/2010, UISDC, Middle District of Florida Case No. 6:10-CVO-01956-PCF-KRS; Kenisha Adams

v Securitas Security Services USA, Inc., filed 5/23/2011, USDC, Middle District of Florida Case No. 1:1 1-CV-21 858- PAS-KRS

Illinois: Crystal Howard, Paul Galloway, Robert Newson and Alvan Young v. Securitas Security Services USA, Inc.; filed on 1/20/2009. USOC, Northern District of Illinois Case No. 08-C-2746; Stephanie Hawkins, Darsemia Jackson and Menja Wallace v. Securitas Security Services USA, Inc., filed 5/12/2008, USDC, Northern District of Illinois Case No. 09-C-3633

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Iowa and Wisconsin: Jesse J. Molyneux and John Stellmach (WI) v. Securitas Security Services USA, Inc., filed 12/9/201 0, USDC, Southern District of Iowa Case No. 4: 10-CV-00588-JAJ-TJS

Pennsylvania: Frankie Williams and Kimberly Ord, filed 12/10/2010, USDC, Eastern District of Pennsylvania Case No. 2:1 0-CV-071 81 -HB

If you are not a named plaintiff, have not joined as a plaintiff or are not part of a certified class in any of these Actions but would like to potentially participate in one or more of the Actions as a class member or plaintiff, you may opt out of this Agreement by following the procedure set forth in Section 9, below. By not opting out of this Agreement as set forth in Section 9 below, however, you will be giving up the right to represent others in litigation and the right to participate in any class, collective or representative action in a court of law, including the Actions enumerated above in which you are not a named plaintiff, have not joined as a plaintiff or are not part of a certified class. If you choose not to opt out of this Agreement, you will be able to arbitrate whatever individual claims you have against the Company. Whatever you decide, you will not be retaliated against, disciplined or threatened with discipline if you choose to opt out of this Agreement or choose not to opt out of this Agreement. The choice is yours.

- 8. You may not wish to be subject to this Agreement. If so, you may opt-out of this Agreement. If you wish to opt-out, you must call the following toll free number 877-248-2721 in order to opt-out. In order to be effective, you must call the toll free number and opt-out within 30 days of your receipt of this Agreement. An Employee who timely opts out as provided in this paragraph will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement. Should an Employee not opt out of this Agreement within 30 days of the Employee's receipt of this Agreement, continuing the Employee's employment constitutes mutual acceptance of the terms of this Agreement by Employee and the Company. An Employee has the right to consult with counsel of the Employee's choice concerning this Agreement.
- 9. It is against Company policy for any Employee to be subject to retaliation if he or she exercises his or her right to assert claims under this Agreement. If any Employee believes that he or she has been retaliated against by anyone at the Company, the Employee should immediately report this to the Human Resources Department.
- 10. This Agreement is the full and complete agreement relating to the formal resolution of employment-related disputes. In the event any portion of this Agreement is deemed unenforceable, the remainder of this Agreement will be enforceable. If the Class Action Waiver is deemed to be unenforceable, the Company and Employee agree that

this Agreement is otherwise silent as to any party's ability to bring a class, collective or representative action in arbitration.

The fifth page of the agreement contains only the concluding language:

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ACKNOWLEDGMENT OF RECEIPT OF THE SECURITAS SECURITY SERVICES USA, INC. DISPUTE RESOLUTION AGREEMENT

BY SIGNING BELOW, I AM ACKNOWLEDGING RECEIPT OF THE SECURITAS SECURITY SERVICES USA, INC. DISPUTE RESOLUTION AGREEMENT, EFFECTIVE IMMEDIATELY.

	Employee Name:				
	Signature:				
15	Date:				
	Witness Name:				
	Signature:				

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III. Analysis and Conclusions

The Respondent maintains the charges are time barred by Section 10(b) of the Act, having been filed more than 6 months after June 14, 2011, the date both hiring agreements were implemented. Moreover, the Respondent maintains there is no record evidence that the new hire agreement, unlike the current employee agreement, has been enforced or has even continued in existence since its implementation date. The stipulation of the parties states that the new hire agreement "has been distributed to employees hired by Securitas in California after June 14, 2011." This language is sufficient to show that the intent of the parties was to stipulate that the Respondent has continued and is continuing to distribute the agreement to all new hires to the present date. I so find. As, I find, both agreements are invalid and currently remain in effect, and, in addition, the Respondent is currently attempting to enforce the current employee agreement before the Los Angeles County Superior Court, it is clear that the charges are not time barred with regard to either agreement. *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F2d 1568 (3rd Cir. 1992); *The Guard Publishing Co.*, 351 NLRB 1110, 1110 fn. 2 (2007).

D. R. Horton, Inc., 357 NLRB No, 184 (2012), is the controlling Board decision in this matter. It is currently pending review before the Fifth Circuit Court of Appeals, having been argued on February 5, 2013. While the Respondent maintains that D. R. Horton was wrongly decided, I am required to follow it unless reversed by the Supreme Court. Waco, Inc., 273 NLRB 746, 749 fn. 14 (1984); Los Angeles New Hospital, 244NLRB 960, 962 fn. 4 (1979), enfd. 640 F2d 1017 (9th Cir. 1981); Pathmark Stores, Inc., 342 NLRB 378 fn. 1(2004). The Respondent maintains that two Supreme Court cases issued subsequent to the Board's D. R. Horton decision, CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012), and American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), establish precedent that effectively overrules D. R. Horton. I find no merit to the Respondent's contention, as the cited cases do not present issues pertaining to the interrelationship between the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA).

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The Board determined in *D. R. Horton* that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial." 357 NLRB No. 184, slip op. at p. 12 (2012). The Respondent's new hire agreement does precisely that. Accordingly, it is unlawful.

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The Respondent maintains that the *D. R. Horton* decision is limited to arbitration agreements imposed as a mandatory condition of employment; accordingly, because arbitration under the current employee agreement is voluntary it is therefore not a mandatory condition of employment and should be found to be lawful. In making this argument the Respondent relies on footnote 28 of *D.R. Horton*:

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[W]e do not reach the more difficult question...of...whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court. *Id.* at p. 13, n 28.

The problems with the Respondent's argument are twofold. First, the current employee agreement, standing alone, is a mandatory condition of employment because, as stated on page 5, it is "effective immediately," that is, before the employee has made any decision to opt out of arbitration; and the decision-making process itself is also a mandatory condition of employment as it is required of employees and is not simply a ministerial, relatively inconsequential matter. Here, employees, as a condition of continued employment, are required to make a decision, under time-sensitive constraints, regarding certain significant class action rights they possess under the NLRA: do they want to preserve them so that they may be able to take advantage of them in the future, or forfeit them in favor of arbitration. Whichever alternative they choose impacts their employment relationship with the Respondent for the remainder of their employment, and, for those who do not opt out, precludes them from determining whether class action is more advantageous than arbitration in any given dispute.¹ That the Respondent recognizes the employee is confronted with a difficult dilemma is clearly reflected by the language in paragraph 8 of the agreement, the opt-out paragraph, as the employee is told he or she "has the right to consult with counsel of the Employee's choice concerning this Agreement."² Moreover, the employee's understanding that default arbitration is the Respondent's dispute resolution preference of choice makes the opt-out decision even more formidable; thus, the employee may be legitimately concerned that such matters as promotions, wage increases, and even tenure may be dependent on whether, for example, one of the candidates for promotion has stated a preference for class action status through the requisite

opting out process in contravention of the Respondent's clear arbitration preference.³

¹ In contrast, a voluntary arbitration agreement which is not a mandatory condition of employment might be one which an employee initiates, and which, in order to resolve a particular dispute, the employee and employer agree upon as a mutually beneficial means of dispute resolution.

² The employee is in the vulnerable position of being required to decide in advance of any particular dispute which method of dispute resolution might be more advantageous—clearly a "flip of the coin" decision. In effect, as collective activity and union activity are equally protected by the NLRA, this is no different than requiring an employee to currently decide whether he or she may exercise the right to seek union representation in the future.

³ Recognizing that this could be a legitimate concern, the Respondent has inserted language in par. 8 of the agreement, the opt-out paragraph, purportedly designed to lessen the employee's apprehension, as follows: "An Employee who timely opts out as provided in this paragraph will

The Respondent contends that by choosing to not opt out and thereby automatically agreeing to the default arbitration alternative, the employee is simply exercising a right under the NLRA to refrain from engaging in concerted activity. The difficulty with this argument is that if the employee does not opt out, the current employee agreement requires the employee to forego participation in all future class action lawsuits, and is irrevocable. Therefore, the employee is precluded from ever engaging in class action lawsuits for the duration of his or her employment. That the employee is permanently locked in to this decision and, periodically, or upon reflection or changed circumstances, may not change his or her mind, places a severe restriction on the right to engage in concerted activity guaranteed by Section 7 of the NLRA, and is unlawful. *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.2d 534 (6th Cir. 2004).

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Since June 14, 2011, and continuing to date the Respondent has arbitrarily established two classes of employees: those who have opted out of arbitration in favor of class action and those who, by default, have not or were given no option to do so. The employees who have not opted out are an impediment to the very purpose of concerted activity—the strategic and economic strength in numbers—and the Respondent is depriving the opted out employees of the right to their collective assistance in ever increasing numbers as no new hire since June 14, 2011, has been able to opt out. Accordingly, whether or not then current employees were given a legitimate opt-out option in the current employee agreement does not negate the fact that opted out employees are precluded from engaging in class-action litigation with all other employees and, by design, are being increasingly marginalized by the Respondent's unlawful conduct in maintaining the new hire agreement and enforcing the current employee agreement..

On the basis of the foregoing I conclude that the Respondent's current employee agreement is unlawful. ⁴ Concerted activity, with or without the election of a union, is the keystone of the NLRA, ⁵ and here, without overtly precluding class-action lawsuits by mandate, the Respondent is attempting to make such class action concerted activity among its employees as exacting as possible. The requirement that employees must make a difficult, and immediate (within 30 days), and irrevocable choice between class action concerted activity or individual arbitration, and that those opting out must reassert rights they already have and must, to their possible detriment, so advise the Respondent, places a significant and unnecessary burden on

not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement." As a practical matter, this disclaimer of any adverse employment action is insufficient to eliminate the real concerns of an understandably skeptical employee; in fact, it may heighten such concerns or cause employees who had no such concerns to begin with to weigh the benefits of class action against the potential adverse consequences of opting out.

⁴ The Respondent, in its brief, cites numerous non-Board Federal cases in which arbitration agreements with opt-out provisions were not invalidated. For example, in *Davis v. O'Melveny & Meyers*, 485 F.3d 1066, 1073 (9th Cir. 2007), the court found that an arbitration agreement was valid because employees had a meaningful opportunity to opt out of the arbitration provision. However, that case and the other cases cited by the Respondent do not address the validity of opt-out provisions in relation to employee's rights under the NLRA. Accordingly, the cited cases are inapposite.

⁵ *D. R. Horton*, supra, slip op. p. 3: "These forms of collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7. Such conduct is not peripheral but central to the Act's purposes."

all employees, whichever alternative they may choose; and, in addition, as noted, maintaining the new hire agreement in conjunction with the current employee agreement places an ever-increasing additional undue burden on employees who opt for collective action.

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Clearly, the current employee agreement is intended to restrain and limit the exercise of Section 7 rights, and the Respondent is applying it by attempting to restrict the class action lawsuit filed by the Charging Parties. It is therefore unlawful under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The cases cited by the Board in *D.R. Horton* in support of its determination that mandatory arbitration agreements are unlawful are equally applicable to the current employee agreement with its "voluntary" opt-out provision.

Secondly, regarding the Respondent's contention that the arbitration alternative is "voluntary," insofar as the stipulated record shows employees are not required to read the current employee agreement; and even if they begin reading it the opt-out language does not appear until page 4. Thus, I find, any opt-out provision is illusory at best. While the new hire agreement, mandating arbitration and containing no opt-out option, requires new hires to affirm that "I have read and I understand and agree to all of the terms contained in this dispute resolution agreement," the employees who have been given the current employee agreement with the opt-out option and who must exercise it in order to preserve Section 7class action rights under the NLRA, are simply advised as follows: "By signing below, I am acknowledging receipt of the Securitas Security Services USA, Inc. dispute resolution agreement, effective immediately." While they are required to acknowledge receipt of the agreement, they are not required to read, understand, or agree to it, and are told it is "effective immediately." Accordingly, it is reasonable to presume that the employees would not even be aware of any opt-out option, and would reasonably believe that "effective immediately" the dispute resolution agreement was imposed on them, as well as the new hires, 6 as a mandatory condition of employment.⁷

The Respondent maintains the opt-out provision is not illusory, as evidenced by the fact that, according to the records of Securitas, approximately 1393 employees in California opted out of the coverage of the agreement, and approximately 12,787 employees in California, or about 90 percent of the workforce, did not opt out. These numbers are of little value in assessing the merits of Respondent's argument, as the employees were simply required to sign for the receipt of the document but were not required to acknowledge that they read, understood, or agreed to it; accordingly, the Respondent is not in a position to argue that 90 per cent of its California employees made a considered decision to forego their class action rights under the NLRA by not opting out, or even understood they had the right to do so.

Accordingly, I find that, as with the new hire agreement, the holding in *D. R. Horton* is directly applicable to the current employee agreement, and that the agreement is unlawful solely because there is no attempt made by the Respondent to ensure that employees are cognizant of the fact that it is anything but a mandatory arbitration agreement. By this conduct the Respondent has violated and is violating Section 8(a)(1) of the Act.

⁶ There is no showing that the current employees and the new hires understood that they were not being given the identical agreement.

⁷ Indeed, this very agreement was found unenforceable in an FLSA class action matter in *Williams v. Security Services*, 2011 WL 2713741 (E. D. Pa. 2011), the court stating, "Quite simply, this Agreement stands the concept of fair dealing on its head and is designed to thwart employees of Securitas from participating in the lawsuit."

Moreover, consistent with the foregoing and as alleged in the complaint, I find that the Respondent's motion to the court to amend the class definition to exclude employees who are subject to the current employee agreement also violates Section 8(a)(1) of the Act. *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983); *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. per curiam mem. 127 F.3d 34 (5th Cir. 1997).

The General Counsel also contends that both arbitration agreements violate Section 8(a)(1) of the Act because of their ambiguity. Thus, the General Counsel maintains that employees reading the documents would reasonably construe the language to prohibit the filing of unfair labor practice charges with the Board.

Both agreements, at Section 1, supra, state that the mandatory agreement to arbitrate disputes "applies to any dispute arising out of or related to Employee's employment," and conclude with the statement that "Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate." Read together, it is perfectly obvious that employees would construe the latter language to place an ambiguous limitation and restriction on "claims" and "access" to the Board, and that this language would reasonably tend to inhibit the filing of unfair labor practice charges with the Board. Accordingly, I find that this language is unlawful in violation of Section 8(a)(1) of the Act. *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. mem. 255 F. Appx. 527 (D.C. Cir. 2007); *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *Dish Network Corp.*, 358 NLRB No. 29, slip op. at 7–8 (2012); *University Medical Center*, 335 NLRB 1318, 1320–1322 (2001), enf. denied in pertinent part, 335 F.3d 1079 (D.C. Cir. 2003).

Conclusions of Law and Recommendations

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Respondent has violated Section 8(a) (1) of the Act as alleged.

35 The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix," at all locations where the agreements have been in effect. See, e.g., *U-Haul Co. of California*, 347 NLRB 375 fn. 2 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007).

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ORDER8

The Respondent, Securitas Security Services USA, Inc., its officers, agents, successors, and assigns, shall

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1. Cease and desist from

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(a) Maintaining the mandatory arbitration agreement, effective on or about June 14, 2011, that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.

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(b) Maintaining the arbitration agreement, effective on or about June 14, 2011, that requires employees to either exercise the opt-out provision or become subject to an arbitration process that precludes employees from maintaining class or collective action in all forums, whether arbitral or judicial.

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(c) Maintaining ambiguously worked arbitration agreements that would tend to inhibit the filing of unfair labor practice charges with the Board.

(d) Restricting the right of employees to engage in concerted activity by attempting to enforce unlawful arbitration agreements in judicial forums.

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(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act.

(a) Rescind or revise the mandatory arbitration agreement, effective on or about June 14, 2011, that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.

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(b) Rescind or revise the arbitration agreement, effective on or about June 14, 2011, that requires employees to either exercise the opt-out provision or become subject to an arbitration process that precludes employees from maintaining class or collective action in all forums, whether arbitral or judicial.

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(c) Advise all affected employees, by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, that the agreements have been rescinded or revised and that employees are no longer prohibited from bringing and participating in class action lawsuits against the Respondent.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (d) Withdraw all objections filed in judicial forums to the right of employees to engage in class or collective action.
- (e) Within 14 days after service by the Region, post at all locations where notices to employees are customarily posted, and transmit to employees by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted and electronically transmitted to employees immediately upon receipt thereof, and shall remain posted for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that the posted notices are not altered, defaced, or covered by any other material.
- (f) Within 21 days after service by the Regional Office, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. November 8, 2013

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Administrative Law Judge

Gerald A. Wacknov

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APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection

WE WILL NOT maintain a mandatory arbitration agreement that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain an arbitration agreement that requires employees to either exercise the opt-out provision or become subject to an arbitration process that precludes employees from maintaining class or collective action in all forums, whether arbitral or judicial.

WE WILL NOT maintain arbitration agreements that employees reasonably could believe bar or restrict their right to file charges with the National Labor Relations Board.

WE WILL NOT interfere with the right of employees to engage in concerted activity by attempting to enforce unlawful arbitration agreements in judicial forums and WE WILL withdraw all objections thereto.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the aforementioned arbitration agreements to make it clear to employees that the agreements do not constitute a waiver of their right in all forums to maintain class or collective actions and do not restrict employees' right to file charges with the National Labor Relations Board.

WE WILL notify employees of the rescinded or revised agreements, including providing them with a copy of the revised agreements or specific notification that the agreements have been rescinded.

SECURITAS SECURITY SERVICES USA, INC.					
(Employer)					

Dated	By				
	(Rep	oresentative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064-1824

(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7350.